Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HILLSBOROUGH COUNTY, FLORIDA, PETITIONER

v.

KENNETH L. BURTON, JULIUS HENRY, JR., HOLLIS DAVIS, WAYNE E. POOLE,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under the Portal-to-Portal Act, as amended by the Employee Commuting Flexibility Act of 1996 ("ECFA"), an employee's time spent commuting to the job site in an employer-issued vehicle is non-compensable even though the employer required the vehicle be parked overnight at a secure parking lot?

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Petitioner Hillsborough County Board of County Commissioners ("Hillsborough County" or "County") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, ____ F.3d ____, 2006 WL 1374493 (11th Cir. 2006) is reproduced in the Appendix at App. 1a. The opinion of the District Court granting Respondents' motion for summary judgment and denying Petitioner's motion for summary judgment is unreported and is reproduced in the Appendix at App. 24a.

JURISDICTION

The opinion of the court of appeals was entered on May 18, 2006. A timely petition for rehearing was denied on June 19, 2006. Appendix at App. 41a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

The Portal-to-Portal Act of 1947, 29 U.S.C. §254(a) was amended in 1996 by the Employee Commuting Flexibility Act ("ECFA"). The ECFA provides in part, that "the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities..." Id. §254(a).

STATEMENT

Petitioner seeks review of the ruling of the Eleventh Circuit Court of Appeals which held that time spent driving an employer-issued vehicle en route to the first job site at the beginning of the work day and en route from the last job site at the end of the day, is compensable under the Fair Labor Standards Act. This holding turns upon the fact that the employer required the vehicles be parked overnight at a secure parking site (such as a fire station or school parking lot) rather than permitting the employees to drive the vehicles home overnight.

Petitioner seeks review of the Eleventh Circuit's ruling for two reasons. First, the ruling is in conflict with the rulings of other circuits that require something more than a *de minimis* detour before a commute is rendered a compensable event. Second, the Eleventh Circuit's ruling is inconsistent with the requirement of the ECFA that any act which is "incidental to the use of the vehicle for commuting," is not compensable. Since the act of parking the vehicle at a secure parking location is "incidental to the use of the vehicle for commuting," Respondents' commutes are not compensable.

In this lawsuit employees of Hillsborough County, Florida, each an inspector of public works projects, claim entitlement to overtime for time spent driving to and from their first job site of the day in County issued vehicles. Upon arrival at the first job site, each employee was expected to utilize his assigned vehicle to drive between job sites to inspect various public works projects. At the end of the work day, the

employee was permitted to leave with the County vehicle from the last job site of the day and drive the vehicle to a pre-selected parking location, where the employee would drop off the County vehicle. The vehicle would remain at that parking location overnight.

There is no dispute that employees derived benefit from the use of the County's vehicles for part of their drive to work and part of their drive home. The County paid for all maintenance and fuel for the vehicles, including the time spent commuting.

This case has not been presented to a fact finder for review. The District Court granted Plaintiffs' motion for summary judgment, finding as a matter of law that all of the Plaintiffs' "drive time" was compensable even though the Court also determined in the same order that "material issues remain".

On appeal, the Eleventh Circuit affirmed, holding as a matter of law that all time spent driving the County vehicles was compensable time. The Court reasoned that the "inconvenient detour" imposed upon employees to pick up and later drop off the employer-owned vehicle each day was of sufficient consequence to render the drive time compensable.

REASONS FOR GRANTING THE PETITION

A. The Decision in the Court Below Creates a Split Between the Circuits.

The Eleventh Circuit's decision creates a conflict with the decisions of at least seven other

circuits. The circuits have responded in significantly different ways to the question of when a commute becomes a compensable event. The circuit decision below is the first to conclude that *any* employer-mandated interruption in an employee's drive to work *automatically* transforms the commute into a compensable event. Appendix at App. 9a ("...where an employer's mandate or job requirement interrupts an employee's home-to-work and work-to-home path, the travel time necessary for the employee to fulfill that requirement...is...compensable...") Other circuits require much more than a mere "interruption" before a commute becomes compensable.

The most analogous case in conflict with the decision below is the post-ECFA decision in *Baker v. GTE North, Inc.*, 110 F.3d 28 (7th Cir. 1997), involving home-to-work commuting in employer-issued vehicles. In that case (as in the case at bar), an employee argued that the drive time was not really a commute but an extension of the work day, because the employee did not drive the car all the way home, instead leaving the vehicle in a parking lot. The Court held that the drive time was not compensable and in so doing aptly noted:

> "An employee who leaves the company car in a parking lot a block away from his house and walks the rest of the way does not become entitled to compensation for driving time, while the employee who pulls into the driveway goes unpaid." *Baker*, 110 F.3d at 31.

Other circuits have similarly decided that more than merely *de minimis* activities are required to transform a commute into a compensable event. In

Aiken v. City of Memphis, 190 F.3d 753 (6th Cir. 1999), one of several cases involving time spent by police officers driving to and from work with their police canines, the Sixth Circuit construed time spent feeding, training, walking and disciplining the dogs en route to work in their police cruisers as a *de minimis* interruption that is "incidental to the use of the vehicle for commuting," therefore a non-compensable activity. By contrast, at bar there has been no factual determination of whether the act of parking the vehicle overnight was "incidental to the use of the vehicle for commuting;" the Court below has simply assumed that the "inconvenient detour" renders the drive time compensable. Appendix at 13a-14a.

Most of the circuits have addressed the question of what is required to transform a commute into a compensable activity. The Second Circuit addressed this issue in *Kavanagh v. Grand Union Company, Inc.*, 192 F.3d 269 (2nd Cir. 1999) (normal travel from home to work was not compensable) and in *Reich v. New York City Transit Authority*, 45 F.3d 646 (2nd Cir. 1995) (time spent by canine unit dog handlers en route to and from work with their dogs was *de minimis* and therefore not compensable); the Fifth Circuit reviewed the issue in *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994) (seasonal farm workers who were considered "hired" from the time they boarded buses traveling four hours to the job site were not entitled to compensation for the time spent on the bus rides). In *Spencer v. Office of the Auditor of Public Accounts*, 928 F.2d 405 (6th Cir. 1991), the Sixth Circuit concluded that travel time was not compensable because "more is required of travel time than the moving of the employee from one place to another." *See also, Bartlomain v. United States Postal*

Service, 870 F.2d 657 (6th Cir. 1989); *Imada v. City of Hercules*, 138 F.3d 1294 (9th Cir. 1998); *Raczkowski v. TC Construction Co., Inc.*, 8 F.3d 29 (9th Cir. 1993); *United Transportation Union Local 1745 v. Albuquerque*, 178 F.3d 1109 (10th Cir. 1999); and *Bobo v. United States*, 136 F.3d 1465 (Fed.Cir. 1998), all of which involved commuting-to-work time, excluded from compensation.

The evident conflict between the circuits is therefore whether *any* "inconvenient detour" is enough to render a commute compensable as a matter of law, or whether more is required. Another unsettled question is whether this analysis becomes a question of fact, or one of law.

The fulcrum upon which this case swings is the fact that the vehicles must be parked overnight at a location other than the employees' homes. If the employer permitted County vehicles to be parked overnight at the employees' homes, there would be no question that the employees' drive time is simply a commute, because there would be no "inconvenient detour" for the employees to park the vehicles. It is therefore the fact that the vehicles must be parked overnight at a parking site other than the employees' homes that created the present controversy.

Uniformity of precedent is needed in this area of law, establishing exactly what is required of employers (whether *any* interruption invariably activates the time clock *as a matter of law*, whether more is required, or whether the circumstances must be determined in each case by the fact finder).

B. The Court of Appeals did not correctly apply the ECFA.

The ECFA provides that "activities performed by an employee which are *incidental* to the use of such vehicle for commuting" are not compensable. Neither the District Court nor the Circuit Court below made a determination of whether the detours in this case were incidental to the commutes. Instead, the Circuit Court held that if a job requirement "interrupts an employee's home-to-work and work-to-home path, the travel time necessary for the employee to fulfill that requirement...is...compensable." Appendix at 9a.

The Eleventh Circuit therefore construed an employer-mandated interruption—*any* interruption—to an employee's commute as rendering the commute compensable. This interpretation is too broadly construed because the ECFA specifically exempts from compensation activities that are incidental to commuting.

Since no fact finder has been given the opportunity to determine whether the requirement of parking vehicles is incidental to commuting, this case should be remanded for such a review. If the fact finder determines that the interruption—picking up the vehicle en route to work—was "incidental to the commute," then the drive time is not compensable.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 05-10247

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KENNETH L. BURTON, JULIUS HENRY, JR., HOLLIS DAVIS, WAYNE E. POOLE,
Plaintiffs-Appellees,

Versus

HILLSBOROUGH COUNTY, FLORIDA,
Defendant-Appellant.

May 18, 2006, Decided

May 18, 2006, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For Hillsborough County, FL, Appellant: Stephen Mark Todd, Hillsborough County Attorney's Office, TAMPA, FL.

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JUDGES: Before TJOFLAT and KRAVITCH, Circuit Judges, and JORDAN, * District Judge.

OPINION: PER CURIAM:

Hillsborough County, Florida, appeals the district court's grant of summary judgment in favor of county employees seeking overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. The County argues, among other things, that the time an employee spends driving a county vehicle to and from a secure county-owned location and the employee's job site is not compensable under the FLSA. We disagree, and affirm.

I.

At all times relevant to this action the employees worked for Hillsborough County's Public Works Department under the title of Engineer I and/or Engineer II. Their duties consisted of driving to public works job sites throughout the County and inspecting the work of subcontractors at those sites. The employees drove county-owned vehicles each day to get from site to site. County policy, however, prohibited the employees from taking the vehicles home at the end of the workday. Instead, the policy required them to drive their personal vehicles to a secure county-operated or owned site (the "parking site"), like a fire station, drop off their personal vehicles, pick up the county vehicles, and drive those county vehicles to their respective work sites. At the end of each work day, the employees then had to return the county vehicles to the parking site and retrieve their own vehicles before returning home.

The county vehicles assigned to each employee contained tools and equipment which the employees used to perform their jobs.[1] The vehicles also served as satellite offices for the employees where they could perform work at the job sites. The employees were required to leave those tools and equipment locked in the county vehicles at the parking sites at the end of their workdays. The County assumed all maintenance and fuel costs for the vehicles. The employees, however, were not paid for the time spent driving from the parking site to the first work site at the beginning of the day or from the last work site back to the parking site at the end of the work day.

In January of 2004, some of these employees brought an action under the FLSA, alleging that the County had incorrectly classified their positions as "exempt" from receiving overtime pay, and that they were entitled to overtime compensation for time spent commuting in county vehicles. By April of 2005, the parties reached a limited settlement agreement in which the County agreed that it had inaccurately classified the plaintiffs as exempt. The parties, however, did not agree on whether the employees were entitled to overtime compensation under the FLSA for time spent driving in county vehicles to and from the County's parking sites and the job sites at the beginning and end of each workday. The parties subsequently filed cross-motions for summary judgment.

The district court denied the County's motion for summary judgment, concluding that issues of fact existed as to whether under the Portal-to-Portal exception to the FLSA (1) the County parking sites were located within the employees' "normal commuting

zones," and (2) the parties had an agreement that the employees would not be compensated for their travel time between the parking site and the job site at the beginning and end of each day. The County alternatively moved for judgment on the pleadings, arguing that the complaint did not sufficiently plead the claim as to overtime for driving to and from the parking sites. The district court summarily denied that motion and explained that the complaint, coupled with subsequent pleadings and hearings, gave the County sufficient notice as to the nature of the employees' FLSA claims.

In that same order, the district court granted the employees' motion for summary judgment, concluding that the travel time was compensable as a matter of law because retrieving and returning the county vehicles containing tools and equipment necessary to perform their jobs constituted a principal activity under the Portal-to-Portal Act, and was therefore compensable travel time under the FLSA. The district court explained that transport of the tools and equipment in the truck was an integral and indispensable part of the employees' ability to perform the principal activities for which they were employed, that no issue of fact existed as to the importance of the tools to the employees' jobs, and, therefore, that transportation of the tools did not constitute an incidental or *de minimis* part of their job. The court further observed that storage of the vehicles and equipment at secure county facilities principally benefitted the County, and provided further grounds for concluding that the employees' travel time to and from the parking sites was compensable.

On appeal the County presents two arguments. First, it contends that summary judgment in favor of the employees was erroneous, essentially because the vehicles were driven only within the employees' normal commuting areas and an understanding existed between the County and the employees regarding the use of the vehicles. Second, the County argues that it is entitled to judgment on the pleadings because the employees did not sufficiently allege entitlement to overtime compensation for their travel time.

II.

The district court's summary judgment ruling is reviewed *de novo*. *See Danskine v. Miami Dade Fire Dept.*, 253 F.3d 1288, 1292 (11th Cir. 2001). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "A factual dispute is genuine only if the evidence is such that a reasonable [factfinder] could return a verdict for the non-moving party." *Danskine*, 253 F.3d at 1292.

Likewise, denial of a motion for judgment on the pleadings is reviewed *de novo*. *See Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir.2001). "Judgment on the pleadings is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. All facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving

party." *Scott v. Taylor*, 405 F.3d 1251, 1253 (11th Cir. 2005).

III.

The FLSA requires employers to pay employees at least a specified minimum hourly wage, 29 U.S.C. § 206, and no less than one and one-half times the regular rate of pay for hours worked in excess of 40 hours per week, 29 U.S.C. § 207. "An employer is not required, however, to compensate an employee for all of the employee's time that is associated with work." *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 272 (2d Cir. 1999). The Portal-to-Portal Act, 29 U.S.C. § 259 et seq., which amends the FLSA, identifies those employee activities which are not compensable under the FLSA. An employer is not subject to liability under the FLSA for failure to pay employees overtime compensation for

(1)walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall

not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a).[2]

Preliminary and postliminary activities, however, are compensable if they are "an integral and indispensable part of the [employee's] principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S. Ct. 330, 100 L. Ed. 267 (1956); *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 399 (5th Cir. 1976).[3] By contrast, an employer is not required to pay employees for otherwise compensable activities if the time spent performing those activities is *de minimis* . *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), *superseded by statute on other grounds as stated in Carter v. Panama Canal Co.*, 150 U.S. App. D.C. 198, 463 F.2d 1289, 1293 (D.C. Cir. 1972); *Dunlop v. City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976).

The issue here is whether the employees are entitled to overtime compensation under the FLSA for time spent driving a county-owned vehicle from the county-owned parking site to the first work-site of the day, and from the last work-site of the day back to the county-owned parking site. This appeal essentially boils down to the definition of the term "travel" in § 254(a) and, specifically, whether travel time of the type here required by an employer falls within the Portal-to-Portal exception.

Statutory interpretation begins with the language of the statute itself. *See Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980). And, as a basic rule of statutory interpretation, we ascribe the plain meaning to the words of a statute. *See Consol. Bank, N.A., Hialeah, Fla. v. United States Dept. of Treasury*, 118 F.3d 1461, 1463 (11th Cir. 1997); *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir.1993). "We are required to look beyond the plain language of the statute only when the language of the statute is unclear or ambiguous, when Congress clearly has expressed an intent contrary to that suggested by the plain language, or when absurd results would ensue from adopting the plain language interpretation." *Consol. Bank*, 118 F.3d at 1463-64 (citing *Alacare Home Health Servs., Inc. v. Sullivan*, 891 F.2d 850, 856 (11th Cir.1990); *Hudgins v. City of Ashburn*, 890 F.2d 396, 405 (11th Cir.1989); *Blue Cross and Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1548 (11th Cir.1990)).

First, we observe that § 254(a) does not eliminate employer liability for all work-related travel -- that is, not all work-related travel is non-compensable time. For instance, "[n]ormal travel from home to work [whether at a fixed location or at different job sites] is not worktime" because it is "an incident of employment," and is therefore not compensable. 29 C.F.R. § 785.35.[4] On the other hand, travel from an employer-designated location to the workplace is compensable under the FLSA as that travel constitutes a part of the employee's principal activity. 29 C.F.R. § 785.38. One of the federal regulations, § 785.38, illustrates this distinction between compensable and non-compensable travel:

Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

See also IBP, Inc. v. Alvarez, 126 S. Ct. 514, 523, 163 L. Ed. 2d 288 (2005) (relying on the same regulation). This regulation defines the term "traveling" in § 254(a)(1) as incidental travel -- typically in the form of home-to-work and work-to-home travel -- and not employer-required travel. Consequently, where an employer's mandate or job requirement interrupts an employee's home-to-work and work-to-home path, the travel time necessary for the employee to fulfill that requirement falls outside of exempted activity in § 254(a), and is therefore compensable under the FLSA. As explained below, this is true even when an employee is using an employer-owned vehicle.

The mere use of an employer-owned vehicle does not eliminate this distinction between incidental or non-compensable travel and required or compensable travel. Thus, where the ECFA says that "the use of an employer-owned vehicle for travel by an employee . . . shall not be considered part of the employee's principal activities," we read "travel" to take on the same

meaning as it possesses in § 254(a)(1) – that is incidental travel, usually in the form of home-to-work and work-to-home commuting. *See* 29 C.F.R. § 785.38 (where employee is required to return to employer's premises prior to returning home, that travel time is compensable).[5] Thus, if an employee driving an employer-owned car is *required* to return to the employer's premises after a day's work prior to returning home, that time is compensable under the FLSA. Accordingly, under the ECFA "otherwise non-compensable [traveling] is not compensable merely because the employee uses his employer's vehicle." *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1117 (10th Cir. 1999). Likewise, otherwise compensable travel time does not become non-compensable simply through the use of an employer-owned vehicle.

Assuming that § 785.38 of the regulations is not clear enough, the legislative history underlying the ECFA is consistent with our reading of § 254(a). The amendment to the Portal-to-Portal Act was intended to provide "clarification regarding the use of an employer-provided vehicle for travel from an employee's home to the first work location at the start of the workday and from the last work location to the employee's home at the end of the workday." H.R. Rep. 104-585, at 4 (1996). It was further intended to "limit[] non-compensable travel to travel between the employee's home and work sites within the normal commuting area of the employer's establishment or service area." *Id.* The ECFA, then, must be read as a modification to § 254(a)(1) and (2) to account for the use of an employer's vehicle when employees are engaged in the kinds of activities exempted in subsections (1) and (2), rather than as an

entirely new category of exempted activity (e.g., a blanket exclusion for *all* travel in an employer's vehicle within the normal commuting area where an agreement exists). Thus, if an employee uses an employer's car for (1) travel (meaning travel to and from home and the place of principal activity, *see* 29 C.F.R. §§ 785.35 and 785.38), or (2) incidental or preliminary and postliminary activities, that time is non-compensable.[6]

Here the parties do not dispute that the county policy prohibited employees from taking the county vehicles home at night. Employees were instead required to park their county vehicles at the 24-hour secured count facility location closest to the construction project to which the employee was assigned.[7] This case does not involve home-to-work travel in a company vehicle, and therefore, falls outside the ambit of ECFA non-compensable travel time in an employer's vehicle. Likewise, the issue is not whether the time for which the employees seek overtime pay constitutes "traveling to and from the actual place of performance of the principal activity," § 254(a)(1), because, as we will explain, the employees' workday could not begin until they arrived at the parking site and retrieved the county vehicles -- making the act of retrieving the vehicle a "principal activity" and, therefore, the parking site itself "a place of actual performance." Instead, the issue is whether the time spent traveling to and from the county parking sites and the work sites at the beginning and end of each day is compensable time.

In *Dunlop v. City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976), the former Fifth Circuit established that the terms "principal activity or activities" are to be liberally construed to encompass "any work of consequence," and

that the Portal-to-Portal Act must be read in conjunction with the rest of the FLSA. *Id.* at 398. In so doing, *Dunlop* explained that "the excepting language of [§ 254] was intended to exclude from FLSA coverage only those activities predominantly spent in the employees' own interests." *Id.* (internal citations and quotation marks omitted). In other words, where the activities at issue are "undertaken for the employees' own convenience," "not being required by the employer," and "not being necessary for the performance of the [employees'] duties" to the employer, they are fairly construed as non-compensable. *Id.* However, when an employer derives "significant benefit" from the activity at issue, that activity is principal to the performance of the work for which the plaintiffs are employed, and is therefore compensable. *Id.* at 399. Put simply, where the activity is "'an integral and indispensable part of the principal activities for which [the employees] are employed,'" the Portal-to-Portal exemption does not apply. *Id.* (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256, 76 S. Ct. 330, 100 L. Ed. 267 (1956)).

Here, as explained earlier, the employees under county policy were required to drive their personal vehicles to a county parking site to retrieve a county vehicle before going to the first work site of the day. At the end of each workday the County required the employees to return the county vehicle to the parking site, not only because the employees obviously needed to get back their personal vehicles, but also because the County required its vehicles to be stored in secure locations overnight. The County understandably did not want its vehicles left at unattended work sites overnight as they would be vulnerable to theft or vandalism. The County

also did not permit its employees to drive the county vehicles home because they sought to avoid the costs associated with potential abuse of the vehicles for personal or unofficial use. Ultimately, the employees who used the county vehicles had no choice but to begin and end their work day not at a work site, but at a county parking facility. And without the county vehicles the employees could not perform the principal activities for which they were employed -- driving throughout Hillsborough County and inspecting public works construction sites. Needless to say, getting a county vehicle from the parking site and driving it to the first work site and returning it to the parking site was integral and indispensable to the plaintiffs' principal activities.

While the employees certainly benefitted from the use of county vehicles -- including the money saved by not having to use their personal vehicles -- that alone does not make the time spent traveling to and from the parking sites non-compensable since that time significantly benefitted the county. *See Sec'y of Labor v. E. R. Field, Inc.*, 495 F.2d 749, 751 (1st Cir. 1974) ("The activity is employment under the Act if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee."). The purpose of storing the county vehicle at a designated county parking site was to minimize the risk to the County of leaving its vehicles in unattended locations and to prevent employees from taking the vehicles home and potentially using the vehicles for personal reasons. That, in and of itself, solely benefitted the County, and acted as an inconvenient detour for the employees who at the end of the workday could not drive directly home. Under the County's policy the

employees' workday could not begin or end without first going to the county parking site. This is no different than an employee punching a time card to mark the beginning and end of the workday and thus the beginning and end of his or her obligation to the employer.

As explained previously, the county vehicles contained various tools the employees needed to perform their inspections at each work site. County policy required the employees to secure the tools in a lockbox in the county vehicle, and prohibited the plaintiffs from removing those tools from the truck. The district court based much of its rationale on the fact that the county vehicles contained these tools and that the employees were required to transport those tools. We find, however, that the existence of the tools in the truck, alone, does not affect the compensability analysis. That is, even if the county vehicles did not contain the tools, the employees would still have to pick up and leave the county vehicles at the county parking sites to get to and from the work sites and would still be barred from driving the county vehicles home. With or without the tools the requirement of going to the county parking site at the beginning and end of the day, for the reasons explained, constitutes a part of those employees' principal activities.

The First Circuit concluded similarly in *Field*. In that case, the employer hired a master electrician to perform electrical work at various construction sites. The employee reported to the employer's shop to pick up a truck containing tools and supplies used occasionally at the job sites. The employee brought an FLSA suit against the employer seeking overtime

compensation for the time spent driving from the construction site back to the shop to drop off the employer's truck. The First Circuit held that the employee was entitled to overtime compensation for the time spent traveling from the job site to the shop to return the company vehicle. 495 F.2d at 751. It explained that it was irrelevant whether the employee could have used his own vehicle to reach the job site or whether the tools were in the truck or stocked at the job site. *Id.* "The crucial question is . . . whether the (employee) was in fact performing services for the benefit of the employer with the knowledge and approval of the employer." *Id.* (internal citations and quotation marks excluded). The fact that employees were required to return the vehicle was enough to make the time compensable. We find *Field* persuasive.

We also conclude that the time the employees spent traveling to and from the parking sites was not *de minimis* and is therefore not excluded from FLSA coverage on those grounds. The Supreme Court in *Anderson* explained the *de minimis* rule as follows:

When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Anderson, 328 U.S. at 692. When applying the *de minimis* rule to otherwise compensable time, the following considerations are appropriate: "(1) the

practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

First, though the record in this case does not explain precisely how the County logs employee hours for purposes of calculating over time compensation, it would seem that at the very least it currently tracks when its engineers arrive at the first work site and when they leave from the last work site each evening. In order to compensate its engineers for the time spent driving to and from the county parking sites, it is at least plausible that the County could instead simply record the time at which each engineer picked up the vehicle at the beginning of the day and the time at which the engineer returned the county vehicle to the parking site at the end of the day. We see no practical difference between these two exercises, and therefore, no administrative difficulty in recording the additional time.

Second, Kenneth Burton stated in his affidavit that he spent an average of 45 minutes to an hour and a half driving from the parking site where he picked up the county vehicle to the first job site, and a similar amount of time driving from the last job site to the parking site at the end of the day to return the county vehicle (or a total of one and one half to three hours per day). There is no evidence in the record refuting Mr. Burton's assertions or suggesting that the drive to and from the county parking site took less time. Nor does the record suggest that Mr. Burton would not have taken as long to travel to the work site had he taken his own vehicle

to and from the work site without making the intervening stop at the county's parking site. Accordingly, we have no reason to conclude that time spent traveling amounts to a mere trifle.[8]

Finally, the employees engaged in the drive to and from the parking site each day of the week. There is no question that the drive was a regular part of their workday. We therefore conclude that travel to and from the parking site was not *de minimis*.

IV.

Finally, the County's contention that the employees have not sufficiently pled the commute time claim is unavailing. The County moved *ore tenus* for judgment on the pleadings at a pretrial status conference on April 20, 2004. The district court denied the County's motion on the grounds that the employees' general assertion about the drive-time had been made clear to the County by this point in the proceedings -- via the general allegation of insufficient overtime compensation under the FLSA in the complaint, and subsequent informal conversations between the parties -- and that the County, therefore, had sufficient notice of the drive-time claim. The County moved for judgment on the pleadings again when it moved for summary judgment. The district court again denied that motion for the same reasons on which it relied at the status conference. We agree with the district court.

A complaint for overtime wages under the FLSA must comply with Rule 8 of the Federal Rules of Civil Procedure, which requires a short and plain statement of the claim showing that the pleader is entitled to

relief. To state a cause of action under the FLSA, a plaintiff is not required to allege that the Act's exemptions are inapplicable. *See Schmidtke v. Conesa*, 141 F.2d 634, 635 (1st Cir. 1944). A statutory exemption is a matter for the defendant to allege as a special defense. *Id. See also Clyde v. Broderick*, 144 F.2d 348, 349-51 (10th Cir. 1994) (in action under FLSA to recover overtime wages, pleader is not required to do more than make a "short and plain statement" of facts upon which he relies to establish his claim that he and his fellow employees were engaged in commerce or in production of goods for commerce within the Act).

Here, the employees alleged that the County failed to compensate them for time worked in excess of 40 hours per week. The complaint, however, makes no reference specifically to the fact that some of the overtime was attributed to driving to and from the county parking sites. The County contends that "a basic requirement to maintaining a cause of action under the ECFA *should* be a pleading in which employees assert how their commutes are excepted from the operation of the ECFA (e.g, that the commutes are outside the normal commute areas or that there is no agreement)." The County's argument, however, is unavailing. First, "[w]hile it may well be preferable to plead different theories of recovery in separate counts, it is not required." *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1247 (11th Cir. 2004). Second, the County erroneously suggests that the employees should have alleged a cause of action under the ECFA rather than the FLSA. The ECFA acts as an exclusion to FLSA coverage, and accordingly serves as a defense which employers can raise, rather than as a separate cause of action that a plaintiff must allege. *See Schmidtke*, 141

F.2d at 635. *See also La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) ("'plaintiffs [are] not required to negate an affirmative defense in their complaint.'") (citation omitted). To state a cause of action under the overtime provisions of the FLSA a plaintiff need not anticipate a potential defense under the ECFA in his complaint by having to allege that the overtime compensation it seeks to recover consists specifically of travel time not covered by the FLSA exempt travel time under the ECFA. Neither the FLSA nor the relevant case law contemplate, let alone require, such a heightened pleading standard for overtime wage claims. The County has provided no persuasive authority suggesting that we should impose such a heightened pleading requirement now.

Furthermore, because the employees allege that the County failed to compensate them for time worked in excess of 40 hours per week, and we take those allegations as true, the County is not entitled to judgment as a matter of law under the FLSA. As previously explained, the ECFA does not treat all travel in an employer's vehicle as non-compensable, and here the time spent driving to and from the parking site was compensable.

V.

For the reasons set forth above, the district court's order granting summary judgment in favor of the employees and denying the County's motion for judgment on the pleadings is affirmed.

AFFIRMED.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Honorable Adalberto Jordan, United States District Judge for the Southern District of Florida, sitting by designation.

n1 Among the tools and equipment stored in the truck were hard hats, safety vests, measuring wheels, tape measures, cloth tape, levels, spray paint, six-foot wood rulers, office supplies, street finders, phone books, project plans and specifications, project files, daily report forms, and reference manuals.

n2 The Employee Commuting Flexibility Act of 1996 ("ECFA") amended the Portal-to-Portal Act by adding the final sentence to § 254(a), which discusses the "use of an employer's vehicle for travel by an employee . . . ."

n3 The Eleventh Circuit has adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

n4 "This court, as required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 81 L. Ed. 2d 694 (1984), accords significant weight to the statutory interpretation of the executive agency charged with implementing the statute being construed, particularly where, as here, that interpretation is incorporated in a formally published regulation." *Martinez-Mendoza v. Champion Intern. Corp.*, 340 F.3d 1200, 1208 n. 25 (11th Cir. 2003).

n5 "Identical words used in different parts of the same act are intended to have the same meaning." *Alvarez*,

126 S. Ct. at 523 (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S. Ct. 2499, 110 L. Ed. 2d 438 (1990)). Thus, the definition of the words "travel" or "traveling" as provided in the regulations applies throughout the statute.

n6 In *Baker v. GTE North, Inc.*, 110 F.3d 28, 30-31 (7th Cir. 1997), GTE sponsored a program which allowed employees to bring their GTE-owned vehicles -- used during the day to travel to job sites -- home at the end of the workday. The plaintiff, who participated in the GTE program, elected to park the GTE vehicle a block away from his home and walk the rest of the way rather than park at home. He then brought suit against GTE demanding overtime compensation for the travel time from the job site to the parking site. The Seventh Circuit held that the ECFA extended beyond the normal work-to-home situation to a case in which an employee elected not to bring the vehicle home. The *Baker* court observed that "an employee who leaves the company car in a parking lot a block away from his house and walks the rest of the way does not become entitled to compensation for driving time, while the employee who pulls into the driveway goes unpaid." *Id.* at 31.

Baker is inapposite to this case primarily because, unlike the employees in *Baker*, the employees here are not permitted to drive the county vehicles home. They are instead required to park the vehicles overnight in a facility closest to the job site.

n7 The Hillsborough County Director of Public Works, Robert Gordon, stated in his affidavit that the employees were permitted to use their personal

vehicles, rather than county-issued vehicles, to visit the work sites; that the employees could park their county vehicles at the parking site of their choice (e.g., a site closest to their homes); that the County encouraged employees to park the county vehicle at sites closest to their respective homes; and that the agreement the employees signed -- which stated that they were required to park their county vehicles at sites closest to the work sites -- was loosely enforced by allowing employees to park close to their homes. Based on Mr. Gordon's affidavit, the County argues that issues of fact exist as to whether the drive to and from the county parking sites was compensable -- namely whether the use of county vehicles was strictly voluntary, and whether employees were permitted to park the county vehicles at sites close to their homes -- the suggestion being that if the employees parked close to their homes, they would be in a similar position to employees who could take their vehicles home and would fall into the Portal-to-Portal exception. The employees contended before the district court and here at oral argument that the affidavit constitutes inadmissible hearsay and that it cannot be considered at summary judgment. We do not, however, reach the hearsay issue because we find that Mr. Gordon's affidavit does not create issues of fact or alter the outcome on appeal.

Aside from Mr. Gordon's affidavit that the County loosely enforced the requirement that the vehicles be parked at sites close to the work sites, the County has not adduced any records or documents to suggest that the employees were not required to park at a parking facility closest to the work site or that the employees did park at sites closest to their homes. Nor does the record, either in Mr. Gordon's affidavit or elsewhere,

contain any evidence suggesting that the employees were permitted to park at their homes. To the contrary, the record contains copies of the county policy, signed by the employees, requiring them to park the county vehicles at approved locations closest to the work sites. In light of the signed policies, a reasonable fact finder could not conclude that the employees were permitted to park wherever they chose, let alone at a site that was most convenient to them. Because there is not a genuine issue of fact as to the County's requirement that the employees park close to the work site rather than close to home, summary judgment in favor of the County is not appropriate as a matter of law. *See Danskine v. Miami Dade Fire Dept.*, 253 F.3d 1288, 1292-93 (11th Cir. 2001) (internal citations and quotation marks omitted).

n8 Based on a five-day workweek, on a weekly basis, time spent traveling to and from the parking site could range from seven and one half hours per week (1.5 x 5 = 7.5), at the low end of Mr. Burton's estimate, to fifteen hours per week (3 x 5 = 15), at the high end of Mr. Burton's estimate. This is not, of course dispositive, but it shows that the travel time is certainly much more than mere minutes' worth of work.

Filed 12/16/04
Case No. 8:04-cv-112-T-MSS
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KENNETH L. BURTON, JULIUS HENRY, JR., and HOLLIS DAVIS, on behalf of themselves and all others similarly situated.,
Plaintiff,

VS.

HILLSBOROUGH COUNTY, FLORIDA,
Defendant.

ORDER

THIS CAUSE comes on for consideration the parties' cross motions for summary judgement, including Plaintiffs' Motion for Partial Summary Judgment on Issue of Drive-Time Compensability (Dkt. 51) and Defendant's Motion for Judgment on the Pleadings and, Alternatively, for Summary Judgment as to Commute Time Issue (Dkt. 52), and the responses thereto[1]

I. PROCEDURAL HISTORY

Plaintiffs bring this class action for recovery of unpaid overtime compensation pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq, as amended. On April 21, 2004, the parties finalized a limited settlement agreement, whereby Defendant has agreed, following the recommendation of a Special Master,[2] to pay Plaintiffs certain unpaid overtime. (Dkt.

22 Limited Settlement Agreement.) The remaining issue to be resolved by the Court is whether Plaintiffs are entitled to compensation for time spent traveling in Defendant's vehicles to and from designated locations to work and to return their work vehicles.[3]

II. UNDISPUTED FACTS

Plaintiffs, who are current and past employees, did not hold a four-year degree from an accredited college or university during their employment and worked under the classification of Engineer I and/or Engineer II for the Defendant's Public Works Department during the period from January 22, 2002 to November 14, 2003. (Dkt. 22, Limited Settlement Agreement, Par. 2B.)

Plaintiffs drove Defendant's vehicles to work sites every work day. (Plaintiffs' Ex. A, Affidavit of Kenneth L. Burton; Ex, B,, Affidavit of Julius Henry, Jr.; Ex, C., Affidavit of Hollis Davis; Ex, D,, Affidavit of Wayne E, Poole; Ex, E., Affidavit of Aliakbar Booshehri; and Ex, F, Affidavit of George Drummond.) Defendant's policy prohibited Plaintiffs from parking its vehicles at their homes. (Dkt. 52, Affidavit of Robert Gordon, Director of Public Works.) As such, Plaintiffs drove their personal vehicles to secured sites operated by Defendant, retrieved Defendant's vehicles, and drove those vehicles to their respective works sites. At the end of the day, Plaintiffs reversed the process. (Plaintiffs' Ex. A, Affidavit of Kenneth L. Burton; Ex. B., Affidavit of Julius Henry, Jr.; Ex. C., Affidavit of Hollis Davis; Ex. D., Affidavit of Wayne E. Poole; Ex. E., Affidavit of Aliakbar Booshehri; and Ex. F, Affidavit of George Drummond.) At no time during the relevant period did Plaintiffs receive overtime compensation for their time

spent traveling from the secured sites to the work sites or back again at the end of the work day.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the parties, through their cross motions, move for summary judgment. The parties dispute whether Plaintiffs' travel time as outlined above is compensable.

III. SUMMARY JUDGMENT STANDARD

A motion for summary judgment may only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 324-325 (1986). "The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case as to which the nonmoving party has the burden of proof." Cornelius v. Town of Highland Lake, 880 F.2d 348, 351 (11th Cir.1989). Mere allegations of denial are insufficient to meet the burden of opposing summary judgment, and the party resisting summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In evaluating a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Credibility determinations, the weighing of evidence,

and the drawing of inferences from the facts are the function of the jury, and, therefore, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in the nonmovant's favor. See id. at 248.

Finally, the relevant rules of substantive law dictate the materiality of a disputed fact. Thus, the decision of summary judgment in this case must be made with reference to the standard of proof applicable to the claims on which the motion is brought. See Rollins v. TechSouth, , 833 F.2d 1525,1527-1528 (11th Cir.1987).

In this case and as previously indicated, the parties dispute whether Plaintiffs' travel time is compensable pursuant to the FLSA, which provides that no employer shall employ any of his employees who have worked for a "workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

Specifically, Defendant contends that Plaintiffs are not due overtime compensation because (1) Plaintiffs' travel was within their normal commuting area, and (2) there was an agreement between Defendant and Plaintiffs regarding compensation for their travel time.[4] Conversely, Plaintiffs contend that their travel time from the secured sites to the work sites and back to the secured sites at the end of the work day constitutes work and is, therefore, compensable overtime. By stipulation, Defendant concedes Plaintiffs have the right to compensation for travel time from November 15, 2003, forward due to a change in policy.

(Defendant's Ex. 1, Affidavit of Robert Gordon, Par. 5.) The pertinent period in dispute, therefore, is for Plaintiffs' travel time from January 22, 2002 to November 14, 2003.

The Court heard argument regarding the parties' motions. For the reasons stated during that hearing and as explained below, the Court ORDERS that Defendant's motion for summary judgment (Dkt. 52) is DENIED, and Plaintiffs' motion for partial summary judgment (Dkt. 51) is GRANTED.

IV. DISCUSSION

A. Compensability Under the Employee Commuting Flexibility Act

Pursuant to the Portal-to-Portal Act, 29 U.S.C. § 251 - 262, Defendant contends that it is exempt from compensating Plaintiffs for their travel time. The Portal-to-Portal Act functions as an exclusion to FLSA coverage. That is, if the Portal-to-Portal Act is applicable, travel time is not compensable under the FLSA, if inapplicable travel time is compensable under the FLSA. In this case, Defendant relies on the Employee Commuting Flexibility Act of 1996 (ECFA), 29 U.S.C. § 254, which amended the Portal-to-Portal Act. Relying on the standard set forth in the ECFA, Defendant contends that all of the travel at issue was within Plaintiffs' normal commute areas and there was an agreement between Defendant and Plaintiffs that there would be no compensation for this travel time.

The Portal-to-Portal Act, as amended by the ECFA, provides that compensable travel time is limited and does not include:

(1) Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
(2) Activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.[5]

29 U.S.C. § 254(a).

However, the ECFA further provides an activity is compensable when;

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or non written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

29 U.S.C. § 254(b)(1-2).

The ECFA amended the Portal-to-Portal Act to allow employers and employees to agree to the use of employer-provided vehicles for commuting between work and home, at the beginning and at the end of the workday, without the commuting time being counted as hours worked. See Department of Labor ("DOL") Opinion Letter Dated April 18, 2001,[6] The DOL has interpreted the ECFA, stating that:

In order for commuting time not to be considered hours worked, the use of the employer's vehicle must be within the normal commuting area for the employer's business or establishment and the use of the vehicle must be subject to an agreement between the employer and the employee or employee's representative.

Id.

Where the issue is whether time spent traveling should be compensable, the Eleventh Circuit has held that the Portal-to-Portal Act applies. See Arriaga v. Florida Pacific Farms, 305 F.3d 1228, 1241. (11th Cir. 2002,) The Eleventh Circuit has held that the Portal-to-Portal Act is a Congressional attempt to "prevent courts from construing the term `work' too widely" and to "delineate

certain activities which do not constitute work," Id, at 1241 (citations omitted). Typically, the regulations do not recognize employees' commute time between their homes and their places of employment as compensable work. See 29 C.F.R. § 785.35.

In this case, the Court finds that material issues remain, precluding a finding in favor of Defendant that no payment is due Plaintiffs. First, there is a dispute as to whether Plaintiffs were required to park nearest to their work sites or whether Plaintiffs were allowed to park at those secured storage sites closest to their homes. Plaintiffs supplied several documents signed by Plaintiffs and their section managers indicating that Plaintiffs were required to park their vehicles at those storage sites closest to the work sites at which they worked. Plaintiffs' Composite Ex, G.) Defendant submitted an affidavit by Robert Gordon, Defendant's Director of Public Works, to establish that Plaintiffs parked at the sites most convenient for them. (Defendant's Ex. 1, Gordon Affidavit, Par. 12.)

During the hearing, Plaintiff objected to Mr. Gordon's testimony as hearsay. (Dkt. 69, Motion Hearing Transcript, p. 69, lines 17 -19.) To the extent that any of Mr. Gordon's testimony is hearsay, the Court cannot consider such information in the summary judgment context. See generally Zaben v. Air Products & Chemicals, Inc., 129 F. 3 d 1453 (11th Cir. 1997). Defendant offered no information to explain if all or portions of Mr. Gordon's testimony were based on Mr. Gordon's first-hand knowledge or whether the statements fall within an applicable hearsay exception. (Dkt. 69, Motion Hearing Transcript, p. 69, lines 17 - 25 ; p. 70, lines 1 - 9.) Furthermore, the Defendant conceded

that Mr. Gordon's affidavit did not directly address Plaintiffs' contention that Defendant required Plaintiffs to park closest to their work sites. (Dkt. 69, Motion Hearing Transcript, p. 76, lines 18 - 24.) The Court noted in the hearing that Defendant also conceded that the ultimate location of the vehicle was approved by the Defendant, and if Defendant made a decision that the location chosen by Plaintiffs was an inappropriate location for any reason, the Defendant had the ability to veto that selection. (Dkt. 69, Motion Hearing Transcript, p. 77, lines 12 - 17.) In light of the issues regarding the nature of Mr. Gordon's testimony as well as contradicting evidence regarding the control Defendant had over the location of the vehicles and the actual location of the vehicles with regard to Plaintiffs' zone of commute, material issues remain, and the Court cannot conclude as a matter of law that Plaintiffs utilized storage sites within their normal commuting zones.

Second, there is no clear indication of an agreement between the parties that Plaintiffs would not be compensated for their travel time. The Eleventh Circuit has yet to address the meaning of an "agreement" with regard to the ECFA. However, the Sixth Circuit has affirmed a district court case addressing this issue. See Aiken v. City of Memphis, 985 F. Supp. 740, 744 (W.D. Tenn. 1997), aff'd at 190 F.3d 753 (6th Cir. 1999). In Aiken, the District Court concluded that the "agreement requirement may be satisfied through `a formal written agreement between the employee and employer, a collective bargaining agreement between the employees [sic] representative and the employer, or an understanding based on established industry or company practices. "' Aiken v.

City of Memphis, 985 F. Supp. at 744 (citing H.R. Rep. No. 104-585 (1996)).

Defendant contends that when Plaintiffs signed out their vehicles, they agreed to follow all of its policies. Plaintiffs' Composite Ex. G.) The Court agrees that Defendant has established that each of the proffered forms required Plaintiffs to abide by Defendant's policies. Notably, however, Defendant offered no evidence to suggest that, if Plaintiffs had read Defendant's procedures, they would have found the answer to the question of whether they would be compensated for their travel time. The documents only explain the guidelines for vehicle checkout, maintenance, usage, and accident reporting. (Defendant's Ex. 1 to Gordon Affidavit, Subject: County Vehicles.) Morever, Defendant has not supplied evidence of a collective bargaining agreement or industry custom or practice that establishes conclusively the existence of such an agreement. Thus, the Court cannot, as Defendant requests, determine conclusively that, pursuant to the ECFA, Plaintiffs are not due compensation for their travel time due to a pre-existing agreement between the parties.

Accordingly, Defendant's motion for summary judgment is DENIED.

B. Compensability When Employees Transport Tools and Equipment

In their motion, Plaintiffs' primary contention is that their travel time is compensable because retrieving and returning the vehicles, which contained tools and equipment necessary to perform their jobs, conferred a

benefit on Defendant. As discussed above, Defendant first contends that this issue should be resolved under the ECFA. Second, Defendant contends that transporting tools was simply a passive act that was incidental to Plaintiffs' work, stating that Plaintiffs' transport of tools and equipment was merely incidental to the commuting and required de minimus effort from which Defendant did not benefit. Rather, Defendant argues that Plaintiffs benefited substantially from driving the vehicles in terms of cost savings for gasoline and wear-and-tear of their personal vehicles, for example.

The principles that apply in determining whether or not time spent in travel is compensable work depends on the kind of travel involved. See 29 C.F.R. § 785.33 (further indicating DOL policy or interpretation regarding the Portal-to-Portal Act as discussed in §§ 785.35 - 785.41). Courts have defined compensable work as those activities "controlled or required by the employer and pursued necessarily and primarily for the benefit of his employer and his business." Dade County v. Alvarez, 124 F.3 d 13 80,13 84 (11th Cir.1997) (quoting Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944)). Thus, activities, including travel, performed before or after the regular work shift, are compensable under the FLSA when they are "an integral and indispensable part of the principal activities for which covered workmen are employed." Alvarez,124 F.3 d at 1384 (citing Steiner v. Mitchell, 350 U.S. 247,256 (1956)). Stated conversely, "Travel time is only compensable under [t]he Portal to Portal Act if it is a principal activity of the employee." Hyman v. Efficiency, Inc., 2004 WL 2792522, at *9 (N.C. App. Dec.7, 2004).

Relying on regulation authority, courts have recognized that "travel has been held part of the employee's principal activity and therefore compensable when it is coupled with transporting equipment without which the employee's job could not be done." Sakas v. Settle Down Enterprises, Inc., 90 F. Supp.2d 1267, 1280 (N.D. Ga. 2000) (citations omitted). Specifically, the regulation reads

Travel that is all in the day's work. Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice.

29 C.F.R § 785.38.

As a preliminary matter, the Court finds that the type of travel time involved in this case, that is, travel to retrieve tools and equipment necessary for Plaintiffs to complete their duties, falls outside of the compensation exemptions provided by the Portal-to-Portal Act, as amended by the ECFA. Because the Court finds that the Plaintiff's activities are "principal," the Portal-to-Portal Act, as amended by the ECFA does not preclude FLSA coverage and Plaintiffs' travel time is compensable.

With regard to compensation for Plaintiffs' travel time to retrieve the vehicles, there is no material dispute as

to the benefit conferred upon Defendant. The evidence establishes that the vehicles served as storage areas for tools and equipment and, at times, served as satellite offices necessary for Plaintiffs to perform their duties. Specifically, the vehicles stored tools and equipment such as safety hard hats, safety vests, measuring wheels, tape measures, cloth tape, 4'X2' levels, spray paint, 6' wood rule, office supplies, street finders, phone books, project plans and specifications, project files, daily report forms and reference manuals. (Plaintiffs' Ex. B, Par. 8; Ex. C, Par. 10; Ex. D, Par. 8; Ex. E, Par. 7; Ex. F, Par. 7; Ex. H, p. 37, lines 1-25.) The nature of the tools and equipment establishes that they were necessary for Plaintiffs to complete their duties. Juan Lopez, former supervisor, stated that "the plans were kept in the vehicles rather than unloading them and loading them all of the time. Some records were kept, document, field inspection records, some logs, et cetera, et cetera were kept, some equipment was kept in the vehicles. And some work was actually performed at the site in the vehicle." (Plaintiffs' Ex. H, Lopez Depo., pp. 89 - 90.) Furthermore, the evidence establishes that even if Plaintiffs drove their own vehicles, the work vehicles would have to be transported to the work sites because six (6) of the Plaintiffs stated, unopposed by Defendant, that they could not remove the tools and equipment from the work vehicles. (Plaintiffs' Ex. A, Par. 12; Ex. B, Par. 8; Ex. C, Par. 10; Ex. E, Par. 7;Ex. F, Par. 7; & Dkt. 69, Motion Hearing Transcript, p. 37, lines 22 - 25; p. 39, lines 1- 20.)

Plaintiffs have established that transport of the tools and equipment was an integral and indispensable part of Plaintiffs' ability to perform the principal activities for which they were employed. Defendant has not

supplied the Court with evidence to counter Plaintiffs' contention as to the nature of their tools and equipment. (Dkt. 69, Motion Hearing Transcript, p. 33, lines 6 -11.) As such, no evidence supports Defendant's claim that Plaintiffs' transport of the tools and equipment to construction sites was merely incidental to their work.

As to compensation for Plaintiffs' time to return the vehicles to the secured sites, such time is also compensable "if it (1) primarily benefited the employer and (2) the employee could not effectively use the time for his own purposes." Sakas, 90 F. Supp. 2d at 1281. In this regard, Defendant was the primary beneficiary from return of the vehicles. That is, Plaintiffs returned Defendant's property to a secured site, which decreased potential loss or harm to Defendant's property. Additionally, as noted above, during the hearing, Defendant conceded it could not establish that Plaintiffs' parked at those secured sites closest to their homes, but rather at a site selected for Defendant's benefit. Even if the vehicles were stored closer to Plaintiffs' homes, Defendant conceded that it would have had the authority to veto the site selection if warranted. In any event, storing the vehicles and the related equipment at a secure facility was principally for the benefit of the Defendant. (Dkt. 69, Motion Hearing Transcript, p. 76, lines 18 - 24; p. 77, lines 12 - 17.)

Accordingly, no material dispute exists regarding Plaintiffs' contention that their travel to retrieve and return Defendant's vehicles was necessary for them to perform their duties and that such travel conferred a

benefit primarily to Defendant. Therefore, Plaintiffs' motion for partial summary judgment is GRANTED.

V. CONCLUSION

For the reasons outlined above, the Court ORDERS as follows:

A. Defendant's Motion for Judgment on the Pleadings and, Alternatively, for Summary Judgment as to Commute Time Issue (Dkt. 52) is DENIED;

B. Plaintiffs' Motion for Partial Summary Judgment on the Issue of Drive-Time Compensability (Dkt. 51) is GRANTED, and

C. The Special Master's factual findings as to the amount of the various Plaintiffs' overtime entitlements, which have been calculated and are deemed "final" pursuant to the Parties' limited settlement agreement, are incorporated herein by reference.

DONE AND ORDERED in Tampa, Florida on this 16th day of December 2004.

Footnotes

fn1Additionally, Defendant moves to withdraw Exhibit 5 of its motion of partial summary judgment relating to Plaintiff, Hollis Davis. (Dkt. 62,) Upon consideration of Defendant's motion, Defendant's motion to withdraw Ex. 5 (Dkt. 62) is GRANTED. Further, with regard to Defendant's motion that Plaintiffs' case be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Procedure, the law requires that the complaint must

simply put the defendant on notice of the allegations against it and must contain more than "only the barest of conclusory allegations without notice of the factual grounds on which they purport to be based." Jackson v. BellSouth Telecommunications, 2004 U.S. App, LEXIS 11578, * 46 (11th Cir. 2004) (citing Swierkiewicz, 534 U.S. 506, 508 n,1 (2002)). Given the current posture of this case, the limited settlement agreement, and the information disclosed during the hearing, the Defendant has been on notice as to the nature of the claims Plaintiffs have raised against it. Accordingly, Defendant's motion to dismiss is DENIED.

fn2 On June 1, 2004, the Court appointed Attorney Claire Saady as Special Master to calculate the amount of overtime owed to Plaintiffs. (Dkt. 35.)

fn3 Currently, the class includes Plaintiffs Kenneth L, Burton, Julius Henry, Jr., Hollis Davis, Wayne E. Poole, Aliakbar Booshehri, George Drummond, and Amos Castillo. Mr. Castillo has no claim regarding overtime compensation due for time traveling in Defendant's vehicles. (Dkt. 52 at Par. 7.)

fn4 Defendant's refer here to provisions of the Employee Commuting Flexibility Act of 1996 (citations omitted), which is discussed in detail in part N. A. of this Order.

fn5 The ECFA language amending the Portal-to-Portal Act begins with the "[F]or the purposes of this subsection" and continues until the end of that sentence.

fn6 Courts "owe substantial deference to an agency's interpretation of its own regulation." Interstate Brands

Corporation v. Local 441 Retail, 39 F.3d 1159, 1163 (11th Cir. 1994)(citing Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994)).

Filed 6/13/2006

No. 05-10247

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KENNETH L. BURTON, JULIUS HENRY, JR., HOLLIS DAVIS, WAYNE E. POOLE,
Plaintiffs-Appellees,

Versus

HILLSBOROUGH COUNTY, FLORIDA, Defendant-Appellant.

ON APPEAL FORM THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ORDER

JUDGES: Before TJOFLAT and KRAVITCH, Circuit Judges, and JORDAN, * District Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellant is denied.

- - - - - - - - - - - - - - - Footnote - - - - - - - - - - - - - - -

* Honorable Adalberto Jordan, United States District Judge for the Southern District of Florida, sitting by designation.

(2)

No. 06-315

FILED
OCT 4 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

HILLSBOROUGH COUNTY, FLORIDA,
Petitioner,

v.

KENNETH L. BURTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

RESPONDENTS' COUNTER-STATEMENT OF FACTS AND QUESTION PRESENTED

This case was brought by the Respondents pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (FLSA) to recover unpaid overtime compensation. The issue in contention is the compensability of time spent traveling in vehicles assigned to the Respondents ("County Vehicles") by the Petitioner, Hillsborough County, Florida (hereafter "the County"). Respondents were assigned these County Vehicles to perform their job duties. Respondents were not permitted to drive the County Vehicles to their homes. Instead, each day the Respondents were required to drive their personal vehicles to secured County-owned parking facilities ("Secured Parking Facilities") to retrieve their County Vehicles before continuing to their job sites. At the end of each day, they were required to return the County Vehicles to the Secured Parking Facilities and drive their personal vehicles home. Respondents' claims arise from the uncompensated time driving their County Vehicles between the Secured Parking Facilities and their job sites (no compensation is sought for the time spent commuting in their personal vehicles between parking sites and the Respondents' homes).

Petitioner, Hillsborough County, Florida frames the issue in this case as follows:

> Whether under the Portal-to-Portal Act, as amended by the Employee Commuting Flexibility Act of 1996 ("ECFA"), an employee's time spent commuting to the job

> site in an employer-issued vehicle is not-compensable even though the employer required the vehicle to be parked overnight at a secure parking lot.

This is a gross misstatement of the legal issue involved in this case. The Portal-to-Portal Act and the ECFA are merely amendments to the statute this case was brought under, the FLSA. Thus, to frame the issue as arising under these amendments, rather than the FLSA itself, is incorrect.

The issue in this case is whether the task of transporting assigned County Vehicles between the County's Secured Parking Facilities and the Respondents' job sites was integral and indispensable to the Respondents' jobs, and therefore compensable under the FLSA. The Eleventh Circuit found that this task was integral and indispensable and, therefore, compensable.

GROUNDS TO DENY THE PETITION

I. The Eleventh Circuit's Ruling Does Not Conflict With Any Other Circuit Court Decision

The County asserts that the Eleventh Circuit's decision conflicts with the holdings of several other Circuits. This is incorrect. Each of the decisions identified by the County presented factual scenarios that materially differ from those presented in the case at bar. To the extent that these decisions and the case at bar are similar (they all involve the general issue of travel time), they are not inconsistent at all. Rather, collectively, they merely provide examples of the well-established principal that activities (including travel) that are integral and indispensable to an employee's job are compensable, while those that are not may be excluded from

compensable time pursuant to the Portal-to-Portal Act. See Steiner v. Mitchell, 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956) (discussing the "integral and indispensable" standard).

The Eleventh Circuit found that the travel time involved in this case was "integral and indispensable" to the Respondents' jobs because transporting the County Vehicles to and from the Secured Parking Facilities was necessary to fulfill the County's mandate that the County Vehicles be secured on County property each night. None of the Circuit decisions cited by the County involved factual scenarios that were materially similar to the case at bar. Rather, these cases fall into three categories that are distinguishable from the Eleventh Circuit's Opinion.

A. "Home-to-Work" Cases

The majority of the cases relied upon by the County are merely examples of decisions holding that commutes between home-and-work are not compensable. Kavanagh v. Grand Union Company, 192 F.3d 269, 271 (2d Cir. 1999) (ruling claim for hours plaintiff spent driving "between his home and the Grand Union stores at which he performed mechanical services."); Imada v. City of Hercules, 138 F.3d 1294, 1295 (9th Cir. 1998) (holding that FLSA does "not require compensation for travel time from home to a site where an employee is to perform essential parts of the activities the employee has been hired to perform); Raczkowski v. TC Construction Company, 8 F.3d 29 (9th Cir. 1998) (Unpublished) (holding that "driving the company truck between home and work" was not compensable); Spencer v. Office of the Auditor of Public Accountants, 928 F.2d 405 (6th Cir. 1991) (Unpublished) (involving home to work commute); Bartlomain v. United States Postal Service, 870

F.2d 657 (6th Cir. 1989) (Unpublished) (addressing policy that set guidelines for compensation of time spent commuting "between a work station and the employee's residence").

As the Eleventh Circuit clearly stated, "this case does not involve home-to-work travel." Appendix to Petition for Writ of Certiorari (hereafter "Appendix"), p. 11a. Rather, it involves travel time between County Secured Parking Facilities and worksites. Unlike the employees in the cases cited above, the Respondents herein were not permitted to drive from home to work in their assigned County Vehicles. Therefore, these cases do not conflict with the Eleventh Circuit's decision. Rather, they involved materially different factual circumstances.

B. "*De Minimus* Interruption of Home-to-Work Commute" Cases

Three of the cases cited by the County, Bobo v. United States, 136 F.3d 1465 (Fed. Cir. 1998), Aiken v. City of Memphis, 190 F.3d 753 (6th Cir. 1999), and Reich v. New York City Transit Authority, 45 F.3d 646 (2d Cir. 1995), likewise involved home-to-work commutes. The added factor presented by these cases was that the employees in these cases transported canines on their commutes, and alleged that they occasionally had to stop due to dog-care activities. Bobo, 136 F.3d at 1467; Aiken, 190 F.3d at 757-58; Reich, 45 F.3d at 651. In all three cases, the Circuit courts found that the interruptions met the definition of compensable activities, but were *de minimus*. Bobo, 136 F. 3d at 1468; Aiken, 190 F.3d at 758; Reich, 45 F.3d at 652-53.

While the County ignores the distinctions between these decisions and the case at bar, they are readily apparent. These cases involved situations in which employees, unlike

the Respondents herein, were permitted to drive their employer-owned vehicles to their homes. As a result, the stops made to attend to their canines were merely occasional, sporadic and brief pauses along a normal home-to-work commute route. By contrast the Respondents herein were not permitted to drive their County Vehicles home and, as a result, were required – each day – to take substantial detours to retrieve their County Vehicles from, and then to return them at the end of the day to, the Secured Parking Facilities. Appendix, pp. 16a-17a. The Respondents drove as much as forty-five (45) minutes, each way, to accomplish the necessary task of transporting their County Vehicles between the Secured Parking Facilities and the job sites. Appendix, pp. 13a, 16a-17a. Thus, in holding that the *de minimus* rule did not apply to the case at bar, the Eleventh Circuit in no way conflicted with the legal rulings of the Federal, Second, or Sixth Circuits.

C. Voluntary Detour Cases

The remaining cases cited by the County involve situations in which the employees' commutes were interrupted by detours that the employees themselves elected to undertake. For example, in Baker v. GTE North Incorporated, 110 F.3d 28 (7th Cir. 1997), the employees were provided vehicles by their employer but, unlike the Respondents herein, were permitted to drive these vehicles home. While most did so, the plaintiff "decided, for reasons of personal convenience, not to do so" but, instead, to leave the car at a location near his home. Id. at 31. The Court held under these limited circumstances, that the plaintiff could not convert a normal home-to-work commute to compensable time merely by virtue of his voluntary decision not to drive the vehicle to his home. Id.

Similarly, in United Transportation Union Local 1745 v. Alburquerque, 178 F.3d 1109 (10th Cir. 1999), the respondents were bus drivers who were compensated from the time their route started, but sought additional compensation for time riding a shuttle between a garage and the location where their shift began. The shuttle ride was entirely voluntary, as employees only obligation was to "arrive on time at his or her starting point for a shift." Id. at 1113. Thus, employees could commute to the garage or to the starting point of their route – it was entirely their choice. Under these circumstances, the shuttle ride was found to be non-compensable.

Finally, in Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994), the employees were given the option of driving directly to their worksites or riding a bus provided by the employer. Because the bus ride was entirely voluntary, the Court found it was not compensable. Id. at 425.

Unlike these cases, the Respondents' job responsibilities rendered the task of retrieving the County Vehicles mandatory, as the Eleventh Circuit stated:

> Ultimately, the employees who used the county vehicles had no choice but to begin and end their work day not at a work site, but at a county parking facility. And without the county vehicles the employees could not perform the principal activities for which they were employed – driving throughout Hillsborough County and inspecting public works construction sites.

Appendix, p. 13a. Thus, because the travel at issue herein was the product of "an employer's mandate or job

requirement," rather than a mere voluntary choice made by the employees, the Eleventh Circuit's decision is distinguishable from, and does not conflict with, the Fifth, Seventh and Tenth Circuit's decisions cited by the County.

II. This Appeal Does Not Present An Important Federal Question Worthy Of Discretionary Review

Supreme Court Rule 10, in describing the circumstances in which certiorari may be warranted, stresses review is typically granted only in cases that that present "important federal questions." The County's Petition makes no effort whatsoever to explain how the narrow issue presented in this case might constitute an important question that would compel review by the Supreme Court.

The factual scenario underlying this case is unusual and unique. Certainly, many employers provide their employees with vehicles to use in the course of performing their job duties. In some instances, the vehicles remain at the job site, while in others, the employees also use the vehicles to commute to and from their job sites. However, this case presents neither of these common scenarios, as the Respondents could neither drive the County Vehicles home nor could they leave them at their job sites. Rather, they were required to transport the County Vehicles to an intermediate location – the County-owned Secured Parking Facilities. The County's Petition offers no evidence showing, nor does it even assert, that this type of policy is common among employers, thereby warranting Supreme Court consideration of the FLSA ramifications of this practice.

Cases of this type do not merit Supreme Court review, as Justice Tjoflat of the Eleventh Circuit aptly remarked in a recent case discussing the standards for granting certiorari:

> Another major reason why the Court will frequently deny certiorari in a case is if the legal dispute is fact-bound-that is, if it arises from a unique constellation of facts unlikely to frequently rise again.

Allapattah Services, Inc. v. Exxon Corporation, 362 F.3d 739 (11th Cir. 2004) (dissenting opinion); see also Stewart A. Baker, Symposium on Supreme Court Advocacy: A Practical Guide to Certiorari, 33 Cath. U. L. Rev. 611, 616 (1984) ("the Court's job is to make law... [Lower courts] cannot be brought into line by a Supreme Court decision that turns exclusively on the facts of one particular case.").

Thus, as this case involves a fact-specific ruling addressing matters that lack the element of public importance and are not likely to arise again with any regularity, certiorari should be denied.

III. The County's Bare Assertion That The Eleventh Circuit's Ruling Was Incorrect Is Not A Sufficient Basis To Grant Certiorari. Moreover, The County Ignores Recent Supreme Court Precedent That Is Consistent With The Eleventh Circuit's Ruling

Section B of the County's Petition argues that the Eleventh Circuit's ruling was incorrect. This assertion does not provide a basis for the Supreme Court to grant certiorari. Simply stated, every petitioner believes that the lower court ruled incorrectly, but that does not entitle all of them to obtain Supreme Court review.

Furthermore, in making this assertion and, in fact, throughout the Petition, the County fails to note that the Supreme Court recently confirmed, consistent with the

Eleventh Circuit's ruling, that travel time occurring after an integral and indispensable task is performed is compensable time under the FLSA. IBP, Inc. v. Alvarez, 126 S.Ct. 514, 163 L.Ed. 2d 288 (2005).[1]

Therefore, Section B of the County's Petition does not provide any basis for this Court to grant certiorari in the case at bar.

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[1] Notably, both the Eleventh Circuit below and this Court in Alvarez relied on the same regulation, 29 C.F.R. § 785.38, in reaching this conclusion.

CONCLUSION

For the foregoing reasons, the County's Petition for writ of certiorari should be denied.

Respectfully submitted,

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